



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.100 OF 2013

LESIIT, J

MUNJIA MICHUBU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Chief Magistrate J.G. KINGORI at MAUA, criminal case No. 2092 of 2012).

JUDGEMENT

1. The Applicant **MUNJIA MICHUBU** was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death by the Chief Magistrates Court at Maua on the 28th October 2013.
2. The Applicant filed his appeal to this court on the 11th November, 2013, together with the Petition of Appeal. It is the application, a Notice of Motion of even date which is under consideration. The Notice of Motion seeks:
 - a. **The Appellant's Appeal No. 100 of 2013 before the High Court Meru is arguable and has overwhelming chances of success.**
 - b. **There exist exceptional circumstances on the part of the appellant in that the Appellant in that the Appellant suffers from Tuberculosis and other related illnesses and which illnesses are incompatible with the Kenyan Prison atmosphere and hence require home based care.**
 - c. **The Appellant is likely to serve a substantial part of the sentence before his appeal can be heard and finally determined in view of the limited number of Judges at the High Court Meru and the heavy work load at the station due to election petitions.**
 - d. **That no prejudice will be occasioned to the prosecution.**
3. There are several authorities which deal with the conditions which must be met by an applicant before bail pending an appeal can be granted. I will examine some of these cases.
4. **In JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605 the court of Appeal held, inter alia:**

1. **The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.**
2. **If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”**

5. The Applicant has deposed in his affidavit in support of this application that he has tuberculosis and high blood pressure and that the condition is incompatible with life in prison. Although I sympathize with the applicant, his condition has not been shown to be an exceptional or unusual circumstance. I am aware that prisons have medical facilities for prisoners under their care which are sufficient to cater for illnesses of this nature. If we were to say that people with tuberculosis and hypertension should not be held in prison it may mean the emptying of our prison around the country. The most important point however is that the conditions the Applicant suffers from can sufficiently be taken care of while in prison.

6. Unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty (Article 49 of the Constitution) an applicant for bail pending appeal stands on the premise that he has already been found guilty on the offence. In an application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (**Ademba vs Republic 1983 KLR PG 442** and **Somovrs Republic 1972 EA 476**). The other considerations are whether there exist exceptional circumstances that would justify the applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal (see **Chimambhai 1971 EA 343**)

At this stage the burden lies with the Applicant to establish that the appeal has high chances of success and that the Applicant is likely to serve a substantial part of his sentence before his appeal is heard. For this proposition I am guided by Case of **Somo vs. Republic 1972 EA 476** where court held.

iii. the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification for depriving the application of his freedom;

7. I am also guided by the case of **Chimambai versus Republic 1971 EA 343** where court held:

i. anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal (R. v. AkbaraliJuma Kanji)

8. On the same proposition I am further guided by the case of **Dominic Karanja v. Republic [1986] KLR 612** the court of Appeal considered conditions which an Applicant for bail pending appeal should satisfy before the application can be granted. The court held:

a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

c. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

9. I have perused the petition of appeal and also the proceedings and judgment in this case. I do not agree with the applicant that his appeal has overwhelming chance of success. In order not to preempt the appeal I will just mention that it may not lead to an outright discharge.

10. When considering an application for bail pending appeal the court has discretion in the matter. However, that discretion must be exercised judicially. The applicant in this case was convicted of one count of robbery with violence and sentenced to death. He was sentenced by the CMS Court at Maua on 28thOctober 2013. As I have already stated I have perused the record of the proceedings and the Petition of Appeal and without prejudicing the pending appeal I can state that the Appeal may be arguable but I do not see it having an overwhelming likelihood of success. I also have personal knowledge of the fact that dates for hearing of appeals are open and I am aware that this appeal is likely to be heard within this year.

11. Having considered the application I decline to grant the Applicant bail pending his appeal he should stay in custody until his appeal is heard. The Applicants appeal is dismissed.

DATED SIGNED AND DELIVERED AT MERU THIS 6th DAY OF FEBRUARY 2014.

J. LESIIT

JUDGE